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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2171**

Lori Misenor,
Respondent,

vs.

County of Washington,
Relator,

vs.

Department of Employment and Economic Development,
Respondent.

**Filed October 11, 2011
Reversed
Johnson, Chief Judge**

Department of Employment and Economic Development
File No. 25176865-3

Lori Misenor, Forest Lake, Minnesota (pro se respondent)

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Considered and decided by Halbrooks, Presiding Judge; Johnson, Chief Judge; and
Minge, Judge.

UNPUBLISHED OPINION

JOHNSON, Chief Judge

Lori Misenor's employment was terminated by Washington County because of excessive personal use of her employer's e-mail system during working hours and because some of her e-mail messages contained racially insensitive and sexually explicit material. An unemployment law judge determined that Misenor is eligible for unemployment benefits. Washington County appeals by way of a writ of certiorari, arguing that Misenor is ineligible for benefits because she was terminated for employment misconduct. We conclude that Misenor was discharged for employment misconduct and, therefore, reverse the ULJ's determination of eligibility.

FACTS

Misenor was an office administrator in the human resources department of Washington County from May 2007 until April 2010. The county has a written policy concerning "acceptable use" of "information technology resources." The policy permits county employees to have only "limited occasional personal use" of the county's information technology resources. The policy also prohibits unacceptable use of the county's information technology resources, including any activity that creates a hostile or offensive work environment, the transmission of any material that could be considered racially or sexually harassing or explicit, and the exchange of large amounts of e-mails. Misenor received a copy of this policy during her employee orientation.

In April 2010, a coworker observed racially insensitive and sexually explicit content on Misenor's computer screen and reported it to Misenor's supervisor. The

supervisor reported it to the human resources director, who conducted a limited review of Misenor's e-mail account and determined that Misenor had exchanged an unacceptable number of e-mails, some of which contained content that the director described as "inappropriate," "vulgar," and "sexual."

The director suspended Misenor and hired an independent investigator to review Misenor's e-mails in light of the county's workplace policies. The investigator found that, over 25 workdays in March and April 2010, Misenor sent 342 personal e-mails from her county e-mail account during business hours. The investigator also found that Misenor's personal e-mails often contained information about Misenor's husband and children, her finances, her extramarital affair or affairs, her critiques of her job and coworkers, her search for a new job, and racially insensitive material. In light of the investigator's findings, the human resources director terminated Misenor's employment on April 26, 2010.

Misenor applied for unemployment benefits. On May 14, 2010, the Department of Employment and Economic Development issued an initial determination of ineligibility on the ground that Misenor had been terminated for employment misconduct. Misenor filed an administrative appeal of the initial determination. An unemployment law judge (ULJ) held two telephone hearings and issued a decision on July 16, 2010, in which he concluded that Misenor was terminated for reasons other than employment misconduct and, thus, is eligible for unemployment benefits. The county requested reconsideration, but the ULJ affirmed the determination of eligibility. The county now appeals to this court by way of a writ of certiorari.

DECISION

Washington County argues that the ULJ erred by determining that Misenor is eligible to receive unemployment benefits. The department responded by conceding that the ULJ erred by deeming Misenor eligible for benefits. Misenor did not file a responsive brief.

This court reviews a ULJ's decision granting benefits to determine whether the findings, inferences, conclusions, or decision are affected by an error of law or are unsupported by substantial evidence in view of the entire record. *See* Minn. Stat. § 268.105, subd. 7(d) (2010). The ULJ's factual findings are viewed in the light most favorable to the decision being reviewed. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). The ultimate determination whether an employee is eligible for unemployment benefits is a question of law, to which we apply a *de novo* standard of review. *Id.*

An employee who is discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2010). The definition of employment misconduct includes “any intentional, negligent, or indifferent conduct, on the job or off the job that displays clearly . . . a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee.” *Id.*, subd. 6(a)(1) (2010). If an employer's workplace policies are reasonable, the employer has a right to expect that its employees will abide by them. *McGowan v. Executive Express Transp. Enters., Inc.*, 420 N.W.2d 592, 596 (Minn. 1988). “[R]efusing to abide by an

employer's reasonable policies and requests amounts to disqualifying [employment] misconduct." *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002).

In this case, the county has a policy that limits the amount of personal use of the county's e-mail system and also prohibits e-mail messages with material that is "obscene, pornographic, [or] racially or sexually harassing or explicit." This is a reasonable policy that establishes a standard of behavior that the county has the right to reasonably expect of its employees. *See Brisson v. City of Hewitt*, 789 N.W.2d 694, 697 (Minn. App. 2010) (holding that employee engaged in employment misconduct by viewing pornography on work computer during business hours). Despite this policy, Misenor sent 342 personal e-mails over a 25-workday period. Many of the e-mails are lengthy, indicating that Misenor took considerable time away from her duties to engage in e-mail correspondence. In addition, some of her e-mails contained racially insensitive and sexually explicit material. Misenor's repeated violations of the county's policy display a serious violation of the standards of behavior that the county has the right to reasonably expect of her. *See* Minn. Stat. § 268.095, subd. 6(a)(1); *Brisson*, 789 N.W.2d at 697.

The ULJ's decision in Misenor's favor was based in part on a finding that Misenor did not receive prior notice from her employer that her e-mail activity was excessive in quantity or objectionable in content. This aspect of the ULJ's decision was flawed for at least three reasons. First, the statutory definition of employment misconduct does not require a warning. *See* Minn. Stat. § 268.095, subd. 6(a). The statutory definition "is exclusive and no other definition applies." *Id.*, subd. 6(e). Second, caselaw makes clear that a warning may be unnecessary if an employee displays a serious violation of

standards of behavior that an employer has the right to reasonably expect. In *Brisson*, the employer did not have a policy prohibiting the conduct in which the employee engaged, but we nonetheless concluded that the employer was entitled to higher standards of behavior. 789 N.W.2d at 697. Third, the evidence shows that Misenor *was* warned about excessive personal e-mails. The agency record includes a written warning that Misenor received and signed in September 2009, which states, in part, “As stated in your last two reviews, you continue to spend too much time during the work day on personal phone calls, personal emails and personal conversations with co-workers.” Thus, the ULJ erred by reasoning that Misenor did not engage in employment misconduct on the ground that she did not receive prior notice that she was violating workplace policies.

The ULJ’s decision in Misenor’s favor also was based in part on the ULJ’s finding that a “majority” of Misenor’s e-mails “occurred between Misenor and her husband” and the ULJ’s belief that those e-mails are protected by the marital privilege. The marital privilege provides that a person may not be compelled to testify against his or her spouse or may not be compelled to testify about communications with his or her spouse that were made during the marriage. Minn. Stat. § 595.02, subd. 1(a) (2010); *In re Westby*, 639 N.W.2d 358, 366 (Minn. 2002). This aspect of the ULJ’s decision also was flawed for at least three reasons. First, the marital privilege does not apply if a person consents to his or her spouse’s giving testimony. *See* Minn. Stat. § 595.02, subd. 1(a). During the agency hearing, Misenor did not object to the introduction of testimony and exhibits about her e-mail messages. Second, the marital privilege does not prevent a third party from testifying about a communication between two other persons who are spouses.

State v. Lasnetski, 696 N.W.2d 387, 394-95 (Minn. App. 2005). Thus, the marital privilege would not prohibit the county's director of human resources or the independent investigator from testifying about Misenor's e-mails to and from her husband. Third, a review of Misenor's e-mails indicates that the majority of her correspondence was *not* with her husband. Thus, the ULJ erred by reasoning that Misenor's e-mail correspondence with her husband precludes a finding of employment misconduct.

In sum, the ULJ erred by determining that Misenor was not terminated for employment misconduct. Therefore, we reverse the ULJ's determination of eligibility and conclude that Misenor is ineligible to receive unemployment benefits.

Reversed.